Nos. 15,108 and 15,107

IN THE

United States Court of Appeals

For the Ninth Circuit

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch Lytle & Green,

Appellants,

vs.

L. A. MARTIN,

Appellee and Cross-Appellant.

} No. 15,108

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch Lytle & Green,

Appellants,

vs.

ROBERT L. MARTIN,

Appellee.

} No. 15,107

Upon Appeal from the District Court for the District of Alaska. Third Division.

BRIEF FOR APPELLANTS.

DAVIS, RENFREW & HUGHES,
Box 477, Anchorage, Alaska,
Attorneys for Appellants.

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BRIEF FOR APPELLANTS.

I. PLEADINGS AND JURISDICTION.

This is an appeal from two separate judgments entered on the 17th day of January, 1956. The subject causes were, by minute order of September 12, 1955,

consolidated for the purpose of trial. (R Vol. 1-07, page 18.) (Since in the consolidated cases there are two Volumes 1, wherever a notation is made referring to Volume 1, the notation will be prefixed by 07 where it refers to the Robert L. Martin cause, and the notation will be prefixed by 08 when referring to Volume 1 of the L. A. Martin transcript.)

The judgment in the first mentioned cause was entered upon a verdict in favor of the plaintiff, awarding the plaintiff Robert L. Martin $7500.00 compensatory damages, and $2500.00 punitive damages against the defendants S. Birch & Son, C. F. Lytle, Green Construction Company and Bud Weber, with costs and attorney's fees fixed by the court. (Vol. 1-07 pp. 54 through 57.)

Judgment in the second cause above mentioned was entered in favor of L. A. Martin, plaintiff, against S. Birch & Son, C. F. Lytle, Green Construction Co., J. P. Bell and Bud Weber. As a result of verdict No. 3 allowing $7000.00 compensatory and $2000.00 punitive damages, the court, upon motion of appellants, ordered a remittitur on the part of the successful plaintiff in the amount of $2500.00 compensatory damages. By minute order and consent to remittitur (R 1-08, pp. 60, 61) the court on January 17, 1956 signed and had entered a judgment against Birch, Lytle & Green, J. P. Bell and Bud Weber in the amount of $4500.00 actual and $2000.00 punitive damages, plus costs and attorney's fees. (R Vol. 2, pp. 62-65.) The defendants Birch, Lytle & Green appealed. (Wherever the three corporate appellants appear

herein, for the sake of brevity, they will be designated as Birch, Lytle & Green.)

The causes herewith considered and consolidated for the purpose of trial in the lower court are within the general jurisdiction of the Alaska District Court (48 USCA Section 101; Alaska Compiled Laws Annotated 1949, section 53-1-1.) Jurisdiction of this court to review the judgment of the District Court is conferred by 28 USCA, sections 1291 and 1294.

For the purpose of reviewing the pleadings in the two separate causes that are herein treated in one brief, first, treatment will be given to the Robert L. Martin (07) case, as they are in most respects on all fours with the L. A. Martin (08) case. A short resumé of the L. A. Martin pleadings will be found at the close of this section. As to argument, the appellants will herein adopt one argument for the sake of brevity, since in all essential respects the cases are the same.

Appellee (plaintiff) Robert L. Martin filed his original complaint November 13, 1952, reciting an incident on the 14th day of August, 1952, wherein the employes of the defendants Birch, Lytle & Green, after the completion of their work day (R 1-07, p. 4) were engaged in the drinking of intoxicating liquor, and alleging that Ross McDonald, after becoming intoxicated, caused an argument with the appellee Robert L. Martin ensuing in a fist fight or rough-and-tumble quarrel resulting in mob violence in which the plaintiff suffered physical damage and hurt. Upon the motion of defendants Birch, Lytle & Green, Ross

McDonald and R. E. Wise, the court by minute order granted a motion of dismissal of the original complaint as to said defendants under date of February 13, 1953. (R 1-07, p. 9.)

Thereafter the appellee Robert L. Martin filed an amended complaint (R 1-07, p. 10) on the 24th day of March, 1953, setting forth substantially the same allegations of damage as were contained in the original complaint, except in the amended complaint appellee Robert L. Martin alleged that certain agents, servants and employes under the control of the defendant Ross McDonald, who was the superintendent for Birch, Lytle & Green, engaged in mob violence and did commit felonious assault and battery upon the above named plaintiff. No allegation was made that the individual defendants remained at the job site after work. Said riot and criminal assault are alleged to have occurred on the Anchorage-Seward Highway at a point about six miles south of Anchorage on the 14th day of August, 1952, resulting in the injury and damage to the plaintiff for actual damages of $50,000.00 and requesting punitive damages in the amount of $25,000.00.

The amended complaint alleges (R. 1-07, p. 11):

> "* * * the defendants, agents, servants and employes engaged in mob violence and did commit assault and battery on the above named plaintiff at a point about six miles south of Anchorage, Alaska, and as a result thereof this plaintiff was severely injured, and both of his eyes were blackened and swollen, with a large laceration about the left eye, causing a hemorrhage into the con-

junctiva, and a contusion about the right zygomatic process, and he was kicked and stomped until his upper left central and lateral incisors were kicked out and loose, and that the lower left central portion and lower incisor teeth were kicked loose from their sockets; the plaintiff was kicked in the back and on the left side until he was black and blue, and that he was stomped and kicked on the right anterior surface of the chest, hand and neck; that the plaintiff suffered a cerebral concussion, and has suffered painful headaches, and has suffered a changed personality, was seriously, painfully and permanently injured."

To the amended complaint the defendants Birch, Lytle & Green, Ross McDonald and R. E. Wise moved to strike certain portions there of (R 1-07, p. 12) including without limitation the portion of plaintiff's amended complaint

"* * * and that the acts complained of were mob violence in violation of the laws of the Territory of Alaska, and did constitute misdemeanors and felonies * * *".

The court by minute order denied the motion to strike (R 1-07, p. 14) under date of April 24, 1953, and gave the defendants Birch, Lytle & Green 15 days within which to answer. (R 1-07, p. 14.)

The defendants Birch, Lytle & Green, in answering, admitted that they were engaged in the joint venture on or about the 14th day of August, 1952, laying hard top at or near the place set forth in plaintiff's amended complaint. They further admit that they

were involved in paving the highway with black top between Anchorage and Girdwood and that the black topping was completed on or about the 14th day of August, 1952, and alleged that the question of whether or not Bud Weber, Joe Sipes, J. P. Bell, John Doe and Richard Roe were in their employment or under the control of Ross McDonald, would depend entirely upon the time of day and the nature of the occupation or acts of said alleged employes at the specific time complained of. They generally denied the allegations of the plaintiff's amended complaint.

The appellants admitted that Ross McDonald was the superintendent in charge of the appellants' project at the time mentioned in plaintiff's amended complaint. The answer of the defendants Birch, Lytle & Green, Ross McDonald and R. E. Wise further alleged that if in fact the plaintiff was injured or damaged in any way at the time set forth in plaintiff's amended complaint, that the same was directly and proximately caused by his own contributory negligence or aggressive action in fomenting an argument with some third party or persons not known to the answering defendants. Both parties demanded trial by jury. (R 1-07, p. 17.) On this state of the pleadings the cause went to trial after a minute order of consolidation. (R 1-07, p. 18.)

The pleadings in the L. A. Martin case, in all essential respects, followed the same pattern as the Robert Martin case. In fact paragraphs I and II are identical, paragraph III differs only in description of personal injuries and paragraph V changes the deadly

weapon from "boots and feet" to "at least one large rock". L. A. Martin in his amended complaint alleged in paragraph IV that he was 51 years of age (R 1-08, p. 11)and had an expectancy in life, according to the American Experience Table of 20.21 years and that his injuries were permanent in nature and had reduced his earning power. In paragraph V of the elder Martin's amended complaint claim was made that he had suffered $40,000.00 actual damage and $25,000.00 punitive damages.

The answer of the appellants to the elder Martin's amended complaint and all other pleadings and motions so nearly approach being identical that no useful purpose can be served by a duplication of recitation herein and accordingly appellants will make no further effort to separate the cases unless by specific reference.

At the close of the appellee's case, motion was made on behalf of Birch, Lytle & Green, R. E. Wise and Ross McDonald for a dismissal of the amended complaint (R 243) which motion was renewed at the close of all evidence on behalf of the same defendants, at which time motion was further made of the court for a directed verdict. (R 408.) The court reserved decision and the cause was submitted to the jury, resulting in a verdict for the plaintiff against Birch, Lytle & Green and Bud Weber. No mention was made in the verdict of the defendants Ross McDonald and R. E. Wise.

Appellants moved for a judgment notwithstanding verdict, and in the alternative for a new trial (R 1-08,

p. 52; 1-07, p. 44) and in the further alternative for order of a remittitur or reduction of judgment consistent with the proof, and moved as a matter of course for an order of remittitur as to punitive damages against the appellants. Appellants took exception to the cost bill filed by appellee and in the alternative moved to strike the cost bill. (R 1-08, p. 54; 1-07, p. 46.)

The court denied all motions except in respect to witness fees in respect to Dr. James E. O'Malley and Nancy Underwood, (R 1-08, p. 59) including the motion for a new trial provided that L. A. Martin, appellee in the companion case, make a remittitur on the verdict under compensatory damages in the amount of $2500.00, and denied costs and attorney's fees to Wise and McDonald. (R 1-07, p. 51-52; 1-08, pp. 61, 62.)

The defendants Birch, Lytle & Green, Ross McDonald and R. E. Wise were represented by counsel and the individual defendants were present at the time of trial. The defendant Bud Weber was represented by John E. Manders who substituted David H. Thorsness, and was likewise present at the time of trial. J. P. Bell, though not present at the time of trial, was represented by counsel. Accordingly J. P. Bell gave no testimony.

II. STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

A. FACTS AND CIRCUMSTANCES.

It should be borne in mind that in the presentation of these two cases, the appellants are, in order to avoid duplication, adopting this brief for the purpose of both appeals prosecuted herein, and since there are two appellees involved, Robert L. Martin on the one hand, age 28 (R 167) and Lemon Allison Martin on the other hand, age 51 (R 1-08, p. 11) father of Robert L. Martin, for the purposes of this brief where the appellants are referring to Robert L. Martin he will be designated as Robert Martin, and Lemon Allison Martin will be designated as the elder Martin.

On the 14th day of August, 1952, the two Martins together with another son or brother as the case may be, were residing in an apartment located approximately nine miles south of Anchorage at an establishment known as Keith & Clara's Place, located just off the Seward Highway between Anchorage and Seward, Alaska. It appears that the appellees Robert Martin and the elder Martin on the day in question, met at the end of Robert Martin's work shift in order that the elder Martin might make application for a job with Arctic Realty (R 110) near Anchorage. The two Martins, after completing the conference with Mr. Hooper of Arctic Realty, left the real estate firm at about 5 o'clock (R 133) and drove some nine miles south of Anchorage (R 161) to Keith & Clara's. There the two Martins engaged for some time with another member of the family in the washing of two motor

vehicles. (R 168.) Thereafter Robert Martin and the elder Martin decided to return to Anchorage to pick up some food for their evening meal and while on their way at a point about six miles south of Anchorage (R 161) observed that the paving gang had completed the laying of black top, or, to use the language of the elder Martin "had wound up the job". The two Martins proceeded to Carr's Grocery at or near 15th and Gambell Street near the southern edge of the City of Anchorage and after completing their purchases, proceeded south bound on their return trip to Keith & Clara's, ostensibly to complete their evening meal.

The Martin vehicle, a late model car (R 157) was being driven by Robert Martin, accompanied by the elder Martin. As they approached mile six on the Seward Highway south of Anchorage they came upon a controlled section of highway approximately 1000 feet in length which was being tended on each end by a flagman. The Martins were waived in from the north end of the controlled highway on the easterly side thereof. Directly across the highway and west of the central portion of the controlled section of the highway there was located a batch plant operated by the defendants Birch, Lytle & Green for the purpose of furnishing black top on the project herein recited. (Appellants' Exhibit C.)

The hour was now between 6:30 and 7 o'clock in the evening (R 118) and the appellants, who had, during the course of the day, employed approximately 55 men in the course of completing the black topping,

then had approximately seven men on the payroll including the defendants R. E. Wise and Ross McDonald, which latter persons were acting in a supervisory capacity and were known as monthly men. (R. 100.) It appears that at or near the end of the shift Ross McDonald, one of the defendants, had arranged for two fifths of whiskey and two cases of beer (R 317) which were placed in the watchman's shack at the plant site in a fashion where the workmen, as they came off shift, could at their leisure have a drink of beer or whiskey in celebration of the completion of the job, as apparently was the custom on the closing of paving projects. No particular invitations were tendered but it was a matter of common knowledge among the workmen that drinks would be available at the end of the shift. So far as can be gleaned from the record, only those employes who were actually off shift and certain Alaska Road Commission employes (R 325) indulged in the privilege of having a drink. (R 346.) Somewhere between 25 and 50 men (R 346, defendants' Exhibit B) accordingly, either had the opportunity to or did indulge in the drinking of whiskey or beer on the occasion above described.

The initial supply of liquor had apparently been consumed because, according to the testimony of R. E. Wise, after completing a patching job some distance south of the controlled area, he was returning with more beer at the time he first observed the altercation hereinafter described. (R 99.)

While the facts are not entirely in agreement as to how the Martins met the Sipes Studebaker in

which Weber and Sipes came to and from work, the results are the same. Robert Martin (at R 203) states:

> "Well, as I remember it, (referring to the Sipes car) he backed out on to the road, back towards the south until he turned back on the older pavement and then just started easing forward and we were so close he couldn't go anywhere neither, so we stopped."

According to Archie Vermilyea, who was the roller operator still employed and who took no part in the altercation (R 261) the Sipes Studebaker came in from the south end of the controlled section of the highway as the last car in a northbound string of vehicles.

> "A. Well, he pulled out from—which we all detoured out around this asphalt from the hot plant—and pulled out around and went down the west side to the southend of this new strip and pulled in and come in the line of traffic.
>
> Q. Now, did you have a chance to observe him as he went down the side?
>
> A. I noticed him going along there—didn't pay a whole lot of attention, but noticed him going along there.
>
> Q. What took place then, after the two cars met, as you saw it?
>
> A. Well, when they met there, why, this Weber gets out of the car and walks up and talks to this car that was facing them there and then he goes back to this car and I don't know what he said or anything, but the man got out and knocked him across the ditch. He got up and boom, the man knocked him down again, and

he got up and the man knocked him down again and the man jumped on him.

Q. Now, did—when you say the man—when you refer to the man—

A. The man that was in the taxicab jumped onto Sipes—or, Weber.

Q. I see. Well, did you make any moves to defend Mr. Weber?

A. No, I was going to join the scene there; I had top seat there; I could see the whole works.

Q. What was the occasion for Mr. Sipes and Mr. Weber being in that particular position, if you know?

A. Well, they was in the line of traffic coming from the south and they followed around there and didn't come on through and—just like anybody would stop and mess around—I don't know what they done, but anyhow, they held up; the flagman turned the other traffic in—that's how they both got to meet there—they went up the one strip of road." (R 261, 262.)

In any event it clearly appears that Sipes and Weber, both truck drivers (R 83) were sharing rides in the Sipes Studebaker and that Sipes and Weber were on their way home. (R 370, 371.) Whatever was the occasion for their presence, each of the parties claimed the right of way. The right of way was ultimately given to the south bound traffic which, prior to the fight, had been headed by the Martin car. The Sipes car after the fight left the scene by way of the freshly laid black top on the westerly side of the road. (R 385.) It further appears that there was at least some traffic behind Robert Martin (R 386) and

that there was no traffic or vehicles behind the Sipes Studebaker.

Martin apparently became incensed at the request of Weber to give way and accordingly, having a radio-equipped car formerly used as a Post Cab, Martin placed a call to his headquarters requesting that the Territorial Police be notified, at which time Weber stook back from the Martin vehicle and allegedly stated in substance:

"He's calling the cops". (R. 169.)

Weber again approached the Martin vehicle, at which time the Sipes Studebaker gave way and backed across the road, leaving the road clear to the south in order that the south bound traffic might drive on. (R 142, 227, 228.)

It further appears that Martin then revoked or cancelled his call for the Territorial Police (R 112) and Weber, carrying a can of beer in his hand (R 141, 153) approached the left hand side of the Martin vehicle and, according to Robert L. Martin, Weber grabbed Martin by the T shirt (R 169), Martin pushed Weber, Weber grabbed Martin's arm, Martin hit Weber with the car door. Robert Martin, when he knocked Weber from the car, got one foot outside his vehicle and claims to have been grabbed by Weber. The competitive spirit was apparently aroused in each party and the fight was on—sometimes up—sometimes down. (R 107.)

According to Archie Vermilyea, who had a high position of vantage, Weber was knocked down three

separate and distinct times, just as fast as he could get up. (R 262.) Mr. Weber testified (R 389):

> "He struck me. I went down and, as I said, the next thing I remember after being hit and going down was the man astraddle of me with his thumb in my eye. Mr. Sipes come up and pulled him off."

The elder Martin, upon seeing Robert Martin and Weber go to the ground (R 114) got out of the Martin vehicle on the right hand side, grabbed a tire wrench, allegedly to break up the conflict between his son and Weber. His intentions are moot. His plans for the use thereof were suddenly interrupted by J. P. Bell who struck the elder Martin, which blow caused the elder Martin to assume a reclining position (R 327) on the easterly side of the road, there to abide the balance of the altercation in a state of shock or unconsciousness, to such a point that no further pertinent testimony could be given by said elder Martin (R 144) until some few minutes later following the clearance of the Martin vehicle from the travelled portion of the highway. (R 114, 118.)

At this point Mr. R. E. Wise, one of the named defendants and a salaried employe of the defendants Birch, Lytle & Green, returned from supervising the patching of a small area some distance south of the controlled lane of traffic in front of the batch plant and observed the fight going on between Martin, Weber and Sipes. Accordingly defendant Wise proceeded to "pull Sipes off" from the Martin-Weber-Sipes fight (R 92) leading him across the road to a

spot near the scale house and at the same time asked other parties not identified, to separate the remaining adversaries Martin and Weber. The Martins were restored to their car.

Though there is some conflict as to why the Martins remained at the scene, it seems reasonably well established that Robert Martin requested by radio that the Territorial Police (R 330, 171) be sent to Keith & Clara's together with an ambulance. The ambulance never arrived (R 238) but some 20 minutes to a half an hour later the Territorial Police, after having passed the batch plant and gone to Keith & Clara's, returned to the scene of the accident, conducted a short investigation and proceeded to dismiss the Martins, who went to their home.

It is established by uncontradicted evidence that the defendants J. P. Bell and Duane J. Weber signed out on their time cards and were not employed after 5:30 and 6 o'clock respectively. (See Exhibit A.) Cecil Sipes completed his shift at 5:30 P.M. (See Exhibit B.) According to the testimony of the superintendent Ross McDonald, there was a total of seven employes who worked for the defendants Birch, Lytle & Green on the day in question after 6:30 o'clock P.M. (See R 323, defendants' Exhibits A and B.) In any event it would clearly appear that the defendants Duane J. Weber and J. P. Bell were, at the time of participating in the acts complained of by Martin, signed out and clearly off the payroll of Birch, Lytle & Green, free to go their way and not acting for their former employers. Weber and Sipes were in fact on their way home.

As a result of the alleged injuries sustained by the Martins arising out of the facts above recited, appellee Robert L. Martin suffered no loss of employment but returned to work the next day. (R 232.) His total pecuniary loss appears to be between $250.00 and $350.00 for an upper plate (R 404) by reason of the loss of two teeth and a loosening of two others. (R 241.) It appears that Robert L. Martin, in the company of the elder Martin, received his only treatment of moment from Nancy Underwood (R 123) who dressed his wounds on the evening in question. (R 165.)

Robert Martin proceeded with his employment with Northwest Airlines (R 232, 233) until the 28th day of December, 1952, when he was struck by a car and hospitalized between December 28, 1952 and March 1, 1953 (R 233) suffering rather severe personal injuries in the form of cerebral contusions and lacerations, contusions of the right kidney, multiple contusions and abrasions, possible vertebral bony trauma, although no fracture evident, fractured pelvis, fractured left transverse process of L5, fractured left tenth rib posteriorly. (R 235, 132.) Following the December 28, 1952 accident and resultant hospitalization, Robert Martin continued in the employment of Northwest Airlines until December, 1954. (R 167, 233.)

Be that as it may, the only physician attending either of the appellees, exclusive of repair to dentures, appears to be the attention received on or about the 16th day of August, 1952, when they visited Dr. James

O'Malley of Anchorage for the purpose of a physical checkup and more than three years later, a few days before the trial (R 193) again visited Dr. James E. O'Malley for a checkup, apparently for the purposes of a comparison study for the trial of the pending cases. Neither plaintiff nor defendant doctors was able to separate the damage attributable to Robert Martin's two occasions of trauma, to-wit: August 14, 1952, the incident involved in this litigation, and the incident of December 28, 1952, (R 234) still in litigation at the time of this trial. (R 201, 272.)

The elder Martin likewise complains of residual headaches but gave testimony of rather constant employment from and after the date of the accident (R 125, 126, 130, 131) save and except some five days of almost uninterrupted rest and sleep following the August 14, 1952 accident. Dr. O'Malley, at R 194, apparently was not aware of this symptom of hibernation until the time of trial. The only outlay of cash on the part of the elder Martin was the sum of $225.00 (R 129) for a new set of dentures, by reason of the altercation on August 14, 1952, wherein the elder Martin claimed that his dentures were broken and his gums and mouth lacerated, as a result of the facts alleged in the amended complaint.

The elder Martin was not seen by Dr. O'Malley from August 16, 1952 until a few days before the trial (R 194), according to the testimony of Dr. O'Malley. The elder Martin, however, testified, at R 127, that he saw Dr. O'Malley three or four times and was given some tablets for his headaches. Otherwise than that no medical attention was given to the elder

Martin, who eventually decided that he would leave the Territory for Seattle, Washington, and he testified that the move was not made because of his health. (R 127.)

B. SPECIFICATIONS OF ERROR.

1. That the evidence was insufficient to establish the relationship of employer and employe, master and servant or principal and agent as between the appellants and the participants in the wrongful acts complained of by the plaintiff.

2. That there was insufficient evidence to establish that the appellants were guilty of an intentional tort.

3. That the verdict was contrary to the law and to the evidence.

4. That the trial court erred in denying defendants Birch, Lytle & Green's motion for a directed verdict made at the close of the plaintiff's case and renewed at the close of all evidence.

5. That the trial court erred in denying appellants' motion for judgment notwithstanding verdict.

6. (07) That the trial court erred in denying appellants' motion for a remittitur.

6. (08) That the trial court erred in ordering a remittitur as to the general damages and making no remittitur as to the punitive damages.

7. That the trial court erred in instructing the jury as excepted to by the appellants at the time of trial, and particularly erred in instructing the jury on mob violence.

8. That the trial court erred in failing to instruct as requested by the appellants.

9. That the verdict is excessive.

10. That the trial court erred in submitting punitive damages to the jury so far as the appellants are concerned.

11. That the trial court erred in its minute order of February 9, 1956 in respect to the fixing of interest upon the judgment.

III. ARGUMENT.

A. INSUFFICIENT EVIDENCE; ERROR OF TRIAL COURT IN DENYING APPELLANTS' MOTION FOR DIRECTION.

The arguments covered under appellants' first point are raised by specifications 1, 4 and 5. It is submitted that the determination of the relationship between the appellants and the actors herein is one of prime importance in disposing of several of the points covered in this argument. These questions were raised at the time of trial by motion on the part of appellants for a dismissal at the close of plaintiff's case and renewed again at the close of all evidence.

Appellants submit that the law almost universally holds that where the inference is clear that there is, or is not, a master and servant relationship, the determination of that question is one of law for the court —otherwise it is a matter for the determination of the jury upon proper instructions by the court. (See *Peetz v. Masek Auto Supply Co.,* 74 NW (2d) 474, Citing the Restatement, Agency, Section 220, page 483.)

To recite a case in point, attention is called to the case of *Orville J. Quinn v. Whiteman Airport Co.,* decided in the District Court of Appeal, Second District, Division One, of California, April 19, 1955, on which a rehearing was denied on June 16, 1955, found at 282 Pac. (2d) page 88. In that case Orville J. Quinn, plaintiff and appellant, rented for $10.00 a month, the right to land and take off and to tie down his airplane at the airport of defendant Whiteman Airport Company. Western Aviation Co., the other defendant, leased from Whiteman Airport Co. a large airplane hangar with the concession for the sale of gasoline and oil. On May 24, 1952, the plaintiff appeared at the airport, intending to wash his airplane. He saw a stepladder standing on the premises of Western Aviation Co. and asked an employe of that company if he could use or borrow the same to wash his airplane. This employe said:

"Sure, go ahead and use it."

The plaintiff thence took the ladder, placed it alongside his airplane and as he climbed to the third step thereof it gave way, causing him to lose his balance and break both arms. It was found that an iron rod or rung under the third step of the ladder was broken. It appeared to be a fresh break.

The plaintiff brought this action for personal injuries against the two named defendants on the theory that the employe of Western Aviation Co. was an agent of defendant and appellee Whiteman Airport Co.

At the close of the evidence on the part of the plaintiff, the trial judge granted a motion for a nonsuit

as to both defendants. An appeal followed which was affirmed. Such a case as the one recited above is a case in which the evidence was clear and convincing and one in which reasonable minds should not differ, and accordingly although each case must be determined with a view to the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act, there should be no quarrel with the conclusion of the court. It might be conceded that where the facts are more difficult the court should generally leave to the jury the question as to whether or not the act was or was not such as to be within the scope of the employment.

To the best knowledge of the appellants, the only reported Alaska case dealing closely with this subject contains a set of facts which, quite contrary to the *Quinn* case above recited, are harshly slanted toward the existence of the relationship, such as the circumstances that we find in *Novick v. Gouldsberry,* 12 Alaska 267, 173 Fed. (2d) 496, which case is interesting because of the type of employment dealt with, to-wit: a bartender. In that case Gouldsberry walked into a bar and ordered a beer. Carroll was tending bar and in charge thereof. Carroll's wife, who had recently been divorced from Gouldsberry, was sitting at one end of the bar. Gouldsberry was in for a quiet evening and pleasantly congratulated Carroll on the marriage and offered to buy Carroll and the former Mrs. Gouldsberry a drink. A conversation ensued between Gouldsberry and Mrs. Caroll, in which Mrs. Carroll confided that people were telling lies about

her. After a little more talk, Gouldsberry told Mrs. Carroll:

> "Well, I don't suppose you bought another man a bathrobe and I had to pay for it."

Carroll then struck Gouldsberry in the face with a bottle, knocking him to the floor and the ensuing struggle caused great bodily harm to Gouldsberry and subsequently lodged him in jail and in the hospital, resulting in the institution of a suit by Gouldsberry and a resultant verdict in his favor for $2500.00 compensatory and $1000.00 against Carroll and his employer Novick. The employer Novick appealed. The judgment of the lower court was affirmed upon appeal. The court in discussing the master's liability for the servant's tort, stated in substance that it was the accepted law that the master may be liable for the wilful and malicious act of a servant within the scope of his employment. It indicated further that a master who authorizes a servant to do acts which may call for the use of force is liable, although the servant exceeded the boundaries of necessity in seeking to achieve the result. The court there cited the Restatement of The Law, Agency, Volume 1, Section 245, comment D. The court further said:

> "At the same time, the master is not liable if the act of the servant was done with the sole intent of achieving an independent result. When this is the case, the mere fact that the act which caused the harm was done while the servant was acting in the employment and on the employer's premises would not result in liability."

The court pointed out that there was nothing to show that the bartender was authorized or employed to commit assaults but it is found that he was authorized to *maintain order* and cited the Restatement of Agency, Section 245, comment A at page 548, which indicates that employment of this character is:

> "One which is likely to bring the servant into conflict with others . . ."
>
> "Accordingly if in the exercise of his control over the premises, he committs an assault upon another, the employer will be held liable. . . ."

In the case at bar it must be borne in mind that according to the best view of the evidence in favor of the plaintiff, the incident complained of occurred at or near 7 o'clock P.M. It has been variously stated as between 6:30 o'clock P.M. and 7:30 o'clock P.M. on the 14th day of August, 1952. If the relationship of master and servant is to be found controlling upon the appellants, it most certainly would have to be found to have existed between one or more of the two known individuals participating in the fist fight or quarrel with Robert L. Martin. Those persons were namely Duane J. (Bud) Weber, whose timecard by defendants' Exhibit A shows him to have ceased employment for the appellants at 6 o'clock P.M., or J. P. Bell, whose timecard, according to defendants' Exhibit A, shows him to have ceased employment at 5:30 o'clock P.M. on the day in question.

It would therefore unequivocally appear that the jury was actuated by malice or passion, a misapprehension or a distortion of the law, in arriving at its

verdict, for it can plainly be seen that if Bell and Weber are, under the instructions, determined to be in the employment and in the course and scope of the appellants' employment, acting in furtherance thereof, that they must thus be so considered notwithstanding the fact that they had, for 30 minutes to an hour and a half, been off the payroll. Weber and Sipes were truck drivers. J. P. Bell was a roller operator and none of the parties was even remotely doing a task in connection with their work at the time of the acts complained of by the appellees. Weber in fact was on his way home when the altercation occurred.

If in fact the master-servant relationship continued to exist between the actors and the appellants after their termination for the day it then becomes but a matter of degree to determine how far up the road this employment relationship and service to the appellants would continue. Does it exist for one mile, two miles, until the participating individuals reach their homes, or where does the relationship cease? Insofar as J. P. Bell is concerned, since his time card shows him to have checked out at 5:30 P.M. (Exhibit A) on the day in question, the clear indication is that he was doing nothing to further the interests of the appellants. J. P. Bell was in fact a collateral participant in the altercation that was initiated between Weber and Robert Martin. The most that could be said is that his occupation prior to 5:30 o'clock on the day in question was the circumstance for his presence. J. P. Bell's actions are not explained except by conjecture. It would seem that he struck the elder

Martin solely for the reason that the elder Martin was about to use a tire wrench on either Weber or Sipes.

Before the actions of the participants Weber or Bell could be chargeable as the act of the appellants it must be conceded that the law would require that their actions fall within the well established formula covering that relationship. The formula, although varying under the many states of fact, would generally require that the actors should be under the control of the appellants; that the actors at the exact time of doing the unlawful act alleged must be furthering the business or affairs of the appellants; that the conduct of the actors should reasonably or necessarily flow from the actors as a result of the relationship between the actors and the appellants; and that the conduct of the actors should be within the range of the apprehensibility of the appellants.

It is submitted that the facts herein recited fail to meet the test in respect to any of the standards or requirements. The situation confronting us here, stated in another way, is simply that the Sipes car and the Martin car were both on the public highway at a place where they had a right to be but that as surely as a person cannot be two places at one and the same time it follows that two vehicles could not occupy space intended only for one. As a result of a useless quarrel over a ridiculous premise the resultant alleged damages occurred. If the appellants are to be charged with responsibility hereunder it would certainly have to be on some other basis than that of the master and servant relationship. There is no

evidence to support the master and servant, employer-employe or principal and agent relationship at the exact time complained of in the pleadings. In fact it is not certain from the pleadings that the appellees intended to urge or attempted to prove that such a relationship existed, for their claim as set forth in their pleadings is based upon mob violence or riot.

It is to be noted further that the proffered instructions on the part of appellees, most of which were disallowed, were based upon riot, battery or mob violence.

It is the contention of the appellants that the facts most favorably interpreted in favor of the plaintiff, would indicate clearly that the participants Weber and Bell were clearly acting outside of the scope and course of their employment to a far greater degree than was the case in *Great A & P Tea Co. v. Aveilhe,* decided July 25, 1955, rehearing denied September 8, 1955, cited at 116 Atl. (2d) page 162. The case itself is no landmark of distinction by virtue of the fact that it comes from the Municipal Court of Appeals of the District of Columbia, but the law which it cites is nonetheless compelling. In that case the clerks, while stacking food goods in a market, indulged in horse play, knocking one of said clerks to the floor, colliding with the plaintiff, causing her resultant injury. The court in holding for the defendant followed the doctrine as set forth in *Evers v. Krouse,* 70 NJL 653, 58 Atl. 181, 66 LRA 592, wherein it was said:

> "An act done by a servant while engaged in the work of his master may, but entirely dis-

> connected therefrom done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, or mischievous purpose of the servant—is not in any sense the act of the master, and for the injuries resulting to a third person from such an act the servant alone is responsible."

The Fifth Circuit Court of Appeals dealt with a similar case in 1933, *Western Union Telegraph Co. v. Hill,* 67 Fed. (2d) 487. In that case an employe in a state of intoxication made obnoxious overtures to a lady customer who had come to the store to have a clock repaired. The employe Sapp said in substance:

> "If you will come behind the counter and let me love and pet you I will fix your clock."

The court held that there was insufficient evidence to go to the jury as to the employer corporation. The court, in meeting the test of whether the servant Sapp was acting within the scope of his employment, held that the evidence was lacking. The employment there as in the case at bar merely furnished a setting wherein the occurrence took place.

The court (with tongue in cheek) said in substance:

> "Even if Sapp made use of that language, he obviously was not thinking of the clock in the store."

The plaintiff Hill claimed an assault by servant chargeable in damages to the master. The Fifth Circuit Court of Appeals determined otherwise.

If such be the case during the admitted course of employment and if the courts, as is so well pointed out, except the wilful act of the servant even though done during the course of employment, when he steps aside from such employment to perpetrate a wrong upon a third person, then certainly in the case at bar there can be no responsibility as against the appellants. Where the acting parties have clearly ceased employment and do an act that could hardly be conceived or expected by the employer, the court should as a matter of course, take from the jury deliberation on the damages chargeable to the master. The *Great A & P Tea* case follows the very early case of *Goodloe v. Memphis and C. R. Co.,* decided in the Supreme Court of Alabama, found at Vol. 18 So., page 166. Reading from the syllabus of that case:

> "At a station platform on defendant's road, one of the defendant's servants, while engaged in a playful scuffle, was unintentionally pushed against plaintiff, who had purchased a ticket, and was preparing to go upon the train, thereby causing him to fall from the platform and sustain injuries. HELD, that the conduct of defendant's employees was not fairly incident to their employment, and the defendant was therefore not liable."

It is difficult to conceive how, in the case at bar, any of the participating parties could have been deemed to be in the pursuance of the interests of the appellants. Contrariwise, it appears to be a situation where reasonable men could not differ and that the

participants were indulging in the satisfaction of a personal michievous whim.

It will be recalled that in *Pac. Tel. & Tel. Co. v. White,* decided in the Ninth Circuit Court of Appeals on the 15th day of June, 1939, cited at 104 Fed. (2d) 923, the court there, in holding against the appellant Pac. Tel. & Tel. Co. set forth the true test from *Tyler v. Moore, et al.,* 111 Ore. 499, 226 Pac. 443. The test there established by the court is as follows:

> "* * * the true test of whether a master is liable for the act of his servant is whether the servant at the time of the commission of the injury was performing a service for the master in furtherance of the master's business, and not whether it was done in exact observance of detail prescribed by his employer."

The principle involved arises from the maxim of common law (respondeat superior). In English it is expressed by the mandate, "Let the superior respond." It means that the principal or the master should be answerable for the acts of his agent or servant. It is based upon the principle that a duty rests upon every person, corporate or otherwise, in the management of his or its own affairs, whether by himself or his agents or servants, so to conduct themselves as not to injure another, and that if the master fails in that duty and another is injured, he shall answer for the damage.

In the *Pac. Tel. & Tel. Co. v. White* case, supra, the Ninth Circuit went into a complete review of the existent Oregon law, citing, so far as we can ascertain,

all of the case law up to that time on the subject of master and servant and damages, and gave particular treatment to the *Gill v. Selling* case, 125 Ore. 587, and the *Fuller, et al. v. Blanc* case, 83 Pac. (2d) 434, which cases the appellants discuss elsewhere herein. The *Pac. Tel. & Tel. v. White* case was distinguished from the *Selling* and *Blanc* cases on the grounds that in the *Selling* and *Blanc* cases the court in making its decision had not treated with the dignity of the servant involved. It will be recalled that in the *White* case the Ninth Circuit, in affirming a judgment of the lower court assessing punitive and actual damages against the employer corporation, held that H. A. Hansley, the chief special agent for Pac. Tel. & Tel. Co. was of such stature in the management and control of his segment of the telephone company's business that his acts would in fact bind the company so as to make the servant's act an intentional act of the corporation, allowing actual and punitive damages.

There is nothing in the *White* case that indicates that the holding of *Fuller v. Blanc* or *Gill v. Selling* is not now or should not be good law providing that the facts of the case fall within the framework of the latter. The appellants contend that in the case at bar the servants involved were menial in nature and not only had the employment ceased but the acts of the agents themselves were clearly beyond any possible scope, intent, purpose, use, benefit, advantage or contemplation of the appellants.

It is a foregone conclusion that before the rule may be applied it must be shown that the relationship of

principal and agent or master and servant exists at the time that the damage was done and that the servant was acting in the course and scope of his employment. It should further be emphasized that *in the course of his employment* is not synonymous with the phrase *during the period covered by his employment.* In the light of this formula the appellants' argument, when applied to the facts heretofore recited upon calm reflection, lead to but one conclusion: the relationship of master and servant did not exist at the time of the acts complained of in the appellee's complaint and accordingly the court should have taken from the jury that question, and the direction in favor of appellants should have been made.

The existence or non-existence of the master and servant relationship in the case at bar, gives rise to another ridiculous and ill-reconcilable situation. The jury, in its finding, remained silent in respect to those employes R. E. Wise and Ross McDonald, who were the only employes admittedly in the employment of the appellants and could, as appellants believe, have done some act in the course and scope of their employment and in the furtherance of the interests of the appellants. The appellants contend that by the failure of the jury to make any mention in its verdict of the defendants' employes Ross McDonald and R. E. Wise, that it has in fact made a finding in favor of the only admitted employes of the appellants who were made defendants on trial of the case at bar. If the court reaches the same conclusion as the appellants in this regard there would be found another

compelling reason for reversal herein by reason of the conflict which is well expressed in the case of *Dixie Ohio Express Co. et al. v. Poston,* Fifth CCA 1948, cited at 170 Fed. (2d) page 446.

In that case the appellees Poston and Weathers brought suit against Dixie Ohio Express Co. and W. E. Killian and L. E. Revels, employes of said company, Mrs. Poston for damages on account of the death of her husband, which occurred when the car which he was driving ran into the rear end of the appellant's truck parked on the highway and Weathers for resultant damage. The jury returned the following verdict:

> "We, the jury, find for the plaintiff, Mrs. Ida Poston, against the Dixie Ohio Express Co., Inc., and the American Fidelity and Casualty Co., Inc., the sum of ($5000.00) five thousand dollars damages."
>
> "We, the jury, find for the plaintiff, M. W. Weathers, against the Dixie-Ohio Express Co., Inc., and the American Fidelity & Casualty Co., Inc., the sum of ($5000.00) five thousand dollars damages."

In the *Poston* case the lower court construed the verdict to be a finding in favor of the defendants Killian and Revels and entered like judgments to that effect in each case. The court says in part and we quote:

> "Numerous Georgia cases conclusively establish the rule in Georgia that where the master was not and could not have been guilty of negligence ex-

> cept through the acts of its servant on the principle of respondeat superior, no liability could be imputed to the master where its servant was exonerated when he alone performed the act which constitutes the basis of the charge for negligence."

It is true that the case above cited is from the state court of Georgia and while we have been unable to locate a parallel holding either in Alaska or under Oregon statute except by analogous reasoning, the *Fuller v. Blanc* and *Gill v. Selling* cases might apply.

The holding in the *Georgia* case above cited is well supported by other authority of parallel reasoning. Attention is called to *Erie R.R. Co. v. Johnson,* decided in 1939 in the Sixth Circuit Court of Appeals, 106 Fed. (2d) at 550, and *Evans v. Hughes and Cecil's Inc.,* a 1955 decision from the United States District Court of North Carolina, cited at 135 Fed. Supp. 555. In the latter case Hughes, a night watchman, shot and severely maimed Evans. Hughes' family was residing on the employer's property in a trailer house located in a housing development under construction. Evans was meddling about the trailer house. The Hughes family became alarmed and upon the theory that Evans was trying to break into the cabin and refused to vacate upon shouted order, Hughes blasted him in the face with a shotgun. The court there held that upon the discharge of Hughes on the theory that he had the right to protect his home and property even though located on company property, such a discharge likewise operated to discharge the employer. It is true that it is a sort of a reverse situation to the case

at bar in that Hughes was clearly an employe at the time of doing the alleged wrongful act, whereas in the present situation the former employes were clearly off duty. The rule is nonetheless controlling.

The appellants contend that the relationship of master and servant is no more maintainable under the present set of facts than it was in the case of *United States v. Eleazer,* cited in the Fourth CCA November 7, 1949, on which certiorari was denied by the United States Supreme Court and cited at 177 Fed. (2d) 914. In the *Eleazer* case a Lieut. Talley, who was stationed at Cherry Point Marine Base in North Carolina, had received an order under date of August 15th, directing him to report to Corpus Christi, Texas, but authorizing him to

> "Delay in reporting until September 1, 1946, such delay to count as leave"

and providing that

> "The travel herein enjoined is necessary in the public service."

Lieut Talley left Cherry Point on August 20th driving his own vehicle accompanied by his sister, intending to drive to Raleigh, North Carolina, then to go to Atlanta, Georgia, whence after a brief stay he would proceed in his automobile to his post at Corpus Christi in time to report for duty on September 1st as required by his orders. An accident occurred whereby the plaintiff brought suit under the Federal Tort Claims Act although so far as the theory of master and servant is concerned the appellants contend that

the law applicable is the same. The lower court had held for Eleazer and the judgment of the District Court was reversed and remanded with directions to enter judgment for the United States. In that case the result is not different than the one urged by the appellants but the opinion is particularly well reasoned and recited such noteworthy authority as Mr. Blackstone. The late Judge Walter H. Sanborn of the Eighth Circuit, in his opinion in *Standard Oil Co. v. Parkinson,* 152 Fed. 681, laid down a still further test. In that case the court recites:

> "The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the casual act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, 'respondeat superior', in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond."

Appellants contend that in the case at bar at the time of the act or alleged acts complained of, there was no superior to respond and the facts are manifold in support of that conclusion. All parties, as the record amply discloses, had ceased employment for the appellants save and except R. E. Wise and Ross McDonald, insofar as this litigation is concerned. The main participating parties were free to go their way and indeed were on their way home. What clearer

proof could be required that the actors Weber, Sipes and Bell were on their own?

The appellants contend that the appellee's case is no better, no worse, than when originally pled and dismissed by the trial court for failure to state a cause of action.

B. INSUFFICIENT EVIDENCE TO ESTABLISH RIOT.

The appellees have excepted to the judgment of the trial court in specifications 2 and 3 on the ground that there was insufficient evidence to establish that the appellants were guilty of an intentional tort and that the verdict was contrary to the law of the evidence.

These questions were likewise raised on trial by motion made at the close of the plaintiff's evidence and for a direction at the conclusion of all evidence.

Each of the subject cases is premised upon the same type of action as will be seen by a review of the pleadings. Nowhere in the appellee's pleadings is there any mention made of negligence. The master, appellants herein, is sought to be charged by virtue of the fact that its employes and servants were guilty not only of an intentional tort but that the employes engaged in mob violence and did commit an assault and battery contrary to the Territorial law.

It is necessary, accordingly, that we review the Territorial law covering this particular subject. The attention of the court is called to chapter 10, ACLA 1949, section 65-10-1:

> "Riot and Unlawful Assembly: Definition. That any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot. Whenever three or more persons assemble with intent, or with means and preparations, to do an unlawful act, which would be riot if actually committed, but do no act toward the commission thereof, or whenever such persons assemble without authority of law, and in such manner as is adapted to disturb the public peace or excite public alarm, or disguised in a manner to prevent them from being identified, such an assembly is an unlawful assembly. (CLA 1913, sec. 199; CLA 1933, sec. 4904.)"

The situation before us obviously is not one that would be within the contemplation of the statute above recited. To justify the verdict of the jury three or more actors must have assembled with intent or with means and preparation to do an unlawful act. Since the jury by its verdict in the Robert Martin case, has determined that there is but one actor, appellants are led to the inescapable conclusion that the jury in its determination of the facts entirely missed the theory of the appellee's case and failed to consider the instruction in that regard contained in the court's instruction No. 16. The court there said:

> "Under the laws of the Territory of Alaska, any use of force or violence, or threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is a riot,

and if you find and believe from the evidence that three or more persons in the execution of some private object assembled together for an unlawful purpose, every man is guilty of all acts done in execution thereof, or contributing or tending to that purpose; if they met for an unlawful purpose and proceeded to an unlawful act, it is a riot provided it resulted in a breach of peace. You are further instructed that the mere presence of a person does not of itself determine that such an individual was a participant or acted in the riot if in fact you find from all the evidence that a riot did in fact take place."

Since in fact the jury by its verdict in both cases, has entered a self-contradiction, there being insufficient actors to comply with the riot theory, and since that is the theory upon which the plaintiff built his case against the appellants, it is accordingly contended that the verdict holding the appellants was error and should have been set aside.

The appellants contend that the quantum of appellee's proof must meet the test of the statute within the appellee's plead case. Under the statute, a minimum number required to act would be three persons. And before the court could sustain this verdict it would have to determine that the quantum of proof under the Alaska statute had been satisfied completely within one person, namely, Bud Weber, who was the only individual person charged with the responsibility in the Robert Martin case. In the L. A. Martin case the jury did find two actors responsible but is still short by one of meeting the requirement of the com-

mon law which is the same as the Territory of Alaska, to-wit: three actors.

How anything could be more ridiculous, self-contradictory or repugnant to candid thought is, as appellants believe, inconceivable. Accordingly it is appellants' contention that the plaintiff in the lower court in each case completely failed in the discharge of the proof necessary or requisite under the pleadings.

As appellants see the facts, they are relatively simple. When we discard the dramatized testimony of Robert Martin, a part of which is found at R 210, the facts are less complicated:

> "A. Well, I thought so. Like I say, when it started, when I hit the ground, I thought that everybody in the country had gone home and got their relatives and the whole bunch piled on. I never saw so many people come in one time in all my life."

Such testimony could hardly do anything short of inflame passion or prejudice and certainly was not consistent with the evidence, even viewed in the light most favorable to the appellee. Robert L. Martin and Bud Weber, each en route to their respective homes, got into a fight as to who was to have the right of way and it seems quite evident that Robert Martin was either holding his own or had a slight margin over his adversary, at which time Joe Sipes, most likely seeing his partner being outnumbered, so to speak proceeded to go to the rescue and undoubtedly did jerk or pull at the hair of Robert Martin

and may have delivered a blow or two. At the same time while Robert Martin was slightly at a disadvantage, Bud Weber may have gotten in a lick with the assistance of Sipes, at which time R. E. Wise appeared and separated Sipes from the quarrel.

During the intervening time the elder Martin observing Sipes coming to the rescue of Weber, who was probably at that time the underdog, decided that he would even the match by the use of a tire wrench. J. P. Bell who was likewise observing the scuffle undoubtedly came over to assist in breaking it up, promptly retired the elder Martin with a blow to the face or body. At that point the fight was over and other parties formerly employed by Birch, Lytle & Green separated the adversaries.

As has been pointed out heretofore, the appellants excepted to the court's instruction No. 16 on the grounds that there was insufficient evidence to give an instruction on riot and that the instructions failed to indicate that the mere presence of a person does not constitute involvement. (R 415.) The court upon such objection added to instruction No. 16:

> "You are further instructed that the mere presence of a person does not of itself determine that such an individual was a participant or acted in the riot, if in fact you find from the evidence that a riot did take place."

It is contended by the appellants that the verdict and resultant judgment in each of these cases on the theory of riot is repugnant to sober thought. By force of numbers alone the verdicts fail to meet the funda-

mental test of instruction 16 even though appellants contend there was insufficient fact to warrant the giving of the instruction. It should be noted that in 46 *Am. Jur.* at section 17, page 135, under Riot, Unlawful Assembly, the text writers have this to say:

> ". . . However, since at common law a riot cannot be committed by less than three persons, if the jury acquit all but two of several indicted for riot, they must acquit those two also, unless it is charged in the indictment and proved that they committed the riot with some other person not tried in that indictment, . . ."

The appellants have tried unsuccessfully to find recent case law on this particular point and there appears to be a dearth of authority. It would accordingly appear that the question is of such fundamental nature that authority is unnecessary. It would seem only reasonable if in a criminal action where all save two of the actors are discharged then the others must likewise be discharged, then the civil side of the alleged criminal act should be governed by the same rule or counterpart in reason.

C. THAT THE TRIAL COURT ERRED IN GIVING INSTRUCTION 14.

Exceptions have been taken to the instructions of the court by the appellants, the greater portion of which become moot in view of the other argument herein contained. This exception was raised at the close of the trial at R 414 wherein appellants' counsel

excepted to said instruction because it fails to reflect or distinguish between the responsibility for the unlawful act of third parties and makes the defendant corporation an insurer. Instruction No. 14, which appellants urge was arbitrary and erroneously given and clearly error, reads as follows:

> "You are further instructed that it is the duty of a person or corporation in custody and in the control of property, to use care to prevent persons lawfully coming upon said premises from injury, and if you find and believe that the defendants did not exercise that degree of care for the protection of persons using the highway under the care of the defendants to protect them from injury, then the defendants would be liable and the plaintiffs would be entitled to recover against the defendants and each of them who failed in their duty to protect the plaintiffs, who you may find were lawfully using the restricted area of the roadway under the control of the defendants Birch, Lytle & Green, as described in plaintiff's complaint, and their agents, servants and employes."

Appellants contend that nowhere in the appellee's pleadings is there such a contention made on behalf of the plaintiffs below and that accordingly the instruction as given by the court is an orphan and not warranted under the evidence.

It should be conceded for the sake of argument that the appellants' responsibility in the case at bar should be founded on one of two bases: either the appellants violated their duty while acting through their servants,

agents or employes to the plaintiff, or, two, the appellants participated in a riot which is in the nature of a conspiracy, therefore responsibility arose under that theory of law.

It should be conceded further that the theory on which the appellee brought his case and plead and proved his case was on the latter theory, even though the court instructed on both theories hereinabove recited.

Appellants contend that it was clearly erroneous for the court to go beyond the pleadings and the proof and to give instructions which add an additional and third theory of possible recovery for the appellees. The appellants accordingly contend that the same is reversible error.

The appellants have sought in vain to find support or authority for the giving of such an instruction as No. 14. One would expect that such notable authority as Randall or Reid's might cover the subject. Extensive search has been made in both Randall's Instructions to the Juries, volume 4, 1922 edition, and Reid's Branson Instruction to Juries, volume 4, third edition, 1936. No such instruction appears under the Master-Servant section of those works on instructions. It appears manifest that a corporation being an inanimate creature of law and being capable of action only through its servants, agents or employes, would receive the attention of these students of the law if the matter were worthy of consideration.

D. THAT THE VERDICTS ARE EXCESSIVE.

This matter, as set forth in exception No. 9, was raised at the time of trial by motion made at the close of plaintiff's evidence and renewed at the close of all evidence and by special motion for a judgment for the appellants (R 1-08, 52; 1-07, 44) and in the alternative for a new trial or a remittitur to not exceed $2500.00 in each case.

We think it can be conceded without citing authority in support thereof that there is no exact crucible in which can be tested the award of damages in this or any other case. If in fact this court finds adversely to the appellants on the other points which, as appellants believe, should be controlling herein, then we must of course consider the question of excessiveness of damages. The fundamental basis for award of damages in civil actions is the just compensation and indemnity or reparation for loss or injury sustained. The cases on that point are abundant. The formula is flexible and assuming for the sake of argument that the cause was properly presented to the jury, it is one largely within the jury's discretion unless good or compelling reason can be shown to the appellate court for ordering a reversal or a remittitur.

Since the law controlling damages in the hands of the jury is most flexible, it is not easily overturned by reason of the fact that as the great preponderance of the authorities state each case must be determined on its own special facts and circumstances. The courts have repeatedly held further that a comparison dollar for dollar with other verdicts given in different places

at different times and under different circumstances do not necessarily help, nor do they necessarily reflect error on the part of the jury in the judgments at bar. This is indeed a difficult and evasive formula with which to treat.

In the case at bar we must then consider the special facts applicable to Robert L. Martin and the damages he sustained, as they might be chargeable against the appellants. It will be recalled in the first place that the employer-employe relationship which existed between the appellants and the actors for some time prior to the alleged acts, terminated at the time the actors completed their shift and started for home. The employment that had existed did furnish a stage whereon the occurrence took place.

Robert L. Martin testified that he lost no work as a result of the altercation complained of in his amended complaint (R 232, 233) and although he states he took lighter work following the altercation, no particular reason is given for the lighter work. No history of medical attention is set forth in the testimony and accordingly it must be assumed that Robert Martin's bruises healed in the usual course of events and that his recovery was uneventful. It is true that on August 16, 1952, according to his doctor's testimony, he appeared for an examination at Dr. James E. O'Malley's and again approximately three years later appeared before Dr. James E. O'Malley some few days just prior to trial. It must be conceded that the greater portion of Robert L. Martin's symptoms were subjective in nature except for those

in evidence immediately following the altercation itself, which would be limited to lacerations and superficial cuts and the ultimate removal of the remaining upper teeth to accommodate an upper denture at a cost of $250.00 to $300.00. It is to be noted that at R 404 Robert Martin was not sure of this amount, nor did he know for sure who did his dental work.

In the case of the elder Martin it is true that the testimony most favorable to him discloses that he had four or five days of hibernation although as has been heretofore pointed out, Dr. O'Malley was unaware of this condition even though he was the only physician consulted. (R 194.) We learn that L. A. Martin made $1600.00 while working approximately 45 days as a real estate merchant. Shortly thereafter he was employed by the United States government as an appraiser at a yearly salary of $6400.00, which employment he followed for five months. Thereafter for a period of about eight months he and his sons operated a real estate agency in Anchorage until the elder Martin decided that he would like to move to Seattle. The elder Martin's post injury history to say the least was not remarkable. (R 125, 127.) Both plaintiff and defendant doctors in taking physical checkups, report that their findings were substantially negative. The elder Martin was declared to be in a good state of general health for a man of his years. The younger Martin was described as a fine specimen of manhood, (R 271) weighing some 200 pounds and who gave to the defendants' doctor a history of complaint that dealt largely with the low back and accordingly could

only be associated with his injury of December 28th, at which time he sustained an L5 damage according to his testimony. (R 235, 236.)

The pecuniary loss in each case was limited to the placement or the repair of dentures.

The cases reviewed that might shed light on this particular subject are not, as hereinabove pointed out, of great compelling force upon the court, nor are they too helpful. In those cases where damages assessed by the jury are clearly excessive the courts are likely to enter a per curiam opinion and merely state that the verdict is obviously excessive and the judgment affected by misunderstanding, malice or passion on the part of the jury, and order a remittitur and say no more. Such a case is *Baumann, respondent, v. Gulf Oil Corp.,* Supreme Court, appellate division of New York, under date of January 16, 1956, cited at 147 N.Y. Supp. (2d) 735. The court in that case merely says that a personal injury action $31,000.00 verdict was grossly excessive and ordered a remittitur to the amount of $10,000.00 or in the alternative a new trial.

The question is what should the reviewing court do in those cases where damages appear excessive and the claimant puts in largely subjective evidence? In other words, he says "I hurt" as in this case where the appellee Robert L. Martin says "my head aches from time to time and it didn't before the accident" yet the doctors (R 186) are unable to attribute those headaches to anything other than subjective symptoms. (R 268.)

L. A. Martin likewise gave a history of head and neck aches but not constant. At R 126 in referring to his physical condition after he opened a real estate business apparently in 1953, he stated as follows:

> "For the first four months, I felt pretty good, but if I'd get out and get a cold, I'd take a headache and I couldn't stand no strain of any kind. . . ."

In this respect a review of the case of *Harding v. Kansas City Public Service Co.,* 1945, cited at 188 SW (2d) at page 60, might be helpful. In that case the court ordered a remittitur as a condition to granting a new trial. At the time of the accident the plaintiff was employed at a weekly wage of $30.00. According to his own evidence he lost five weeks' time and then went back to work at various employments as was specifically detailed in the reported case. The total pecuniary loss was shown by the record to be $200.00. In the *Harding* case the appellant contended that under the evidence the plaintiff's injuries were only minor and temporary and that the jury by reason of prejudice or having been misled awarded a verdict that was grossly excessive and demanded a remittitur of $3500.00. The injury claimed to have been sustained was a sprained wrist and back and the history of employment contradicted excessive low back pains and accordingly the $2000.00 remittitur was ordered from the verdict and judgment in the amount of $5000.00. The court said there in part:

> "Evidence in behalf of plaintiff shows that his condition at the time of the trial was greatly im-

> proved; that he had improved considerably and was much better than when he was first examined in November, 1941. This was the testimony of his own doctor. The evidence is not sufficient to justify the amount of damages awarded in this case. The verdict must meet the test of good conscience. On the entire record it is difficult to account for the amount of the verdict in this case except upon the ground of prejudice or a misunderstanding of their duty by the jurors. It is possible that the jury was misled by the instruction on the measure of damages directing the jury to take into account plaintiff's injuries and disabilities. Scrutiny of the entire record leads to the conclusion that the amount of damages allowed in this case is such as to shock the judicial sense of right, and that a manifest injustice would be done defendant to permit the judgment in its entirety to be affirmed."

The court in that case likewise pointed out the futility of attempting to compare one case with another in instances such as these where each case must be reviewed in the light of its own facts. The court said as follows:

> "Both parties cite cases which they claim to be somewhat analogous to sustain their respective positions, but they are of little aid because each case must be determined according to the particular facts and circumstances disclosed in evidence."

With the above in mind it is probably useless to burden this court with analogous or comparative situations of case law taken from other jurisdictions.

However, for what it may be worth, appellants call the attention of the court to *Hayes v. Illinois Central Railroad,* decided in the Court of Appeals of Louisiana, First Circuit, October 6, 1955, rehearing denied November 22, 1955 (83 So. (2d) 160). The court there in substance stated that where the petition prayed for damages in the amount of $2000.00 for pain and suffering, and $3000.00 for permanent injury for the breaking of a left arm and some trauma to the left leg, might well support a $2000.00 award for pain and suffering but an additional award of $2000.00 for permanent injury, unsupported by medical evidence, and sustained only on the ground that the claimant hurt, was clearly excessive and accordingly the latter award of $2000.00 for permanent disability was reduced to $500.00.

The appellants are not to be understood as waiving their contention that they are not responsible in any event under the facts recited in this case merely by reason of the fact that we go in here to the question of damages. Appellants contend that on the state of the record and the medical testimony given where neither the plaintiff doctor (R 201) nor the defendant doctor (R 272) was able to separate the injuries of the appellee Robert L. Martin between the two separate and distinct occasions of trauma, one being the case in controversy on August 14, 1952, and the other one being December 28, 1952, in which latter case the appellee Robert Martin was in a state of unconsciousness for a considerable length of time and spent upwards of two months in hospital as a result thereof,

on which claim litigation was still pending at the time of trial of the present cause. It would appear obvious where the appellee Robert L. Martin showed pecuniary loss not to exceed $350.00, no cessation of employment and his damages were limited to loss of teeth, that an award for actual or compensatory damages in the amount of $7500.00 is clearly excessive, particularly when the only continuing symptoms are subjective in nature.

As has been heretofore pointed out on the authority of *Fuller v. Blanc,* 83 Pac. (2d) at page 434, the master is not responsible or answerable in punitive damages unless it can be demonstrated from the evidence that the agent committed the wrong with the master's knowledge and with his ratification. Certainly the record herein is barren in respect to any knowledge or ratification of the alleged wrong done on the part of the actors herein.

While the *Fuller* case is not controlling in respect to excessive damages, it does treat with damages and particularly with punitive damages as it applies to the master and accordingly we feel that a more mature consideration of the facts of that case is warranted under this section of the argument.

The Supreme Court of Oregon on the 18th day of October, 1933, in the case of *Fuller, et al., v. Blanc,* 83 Pac. (2d) at page 434, considered the question insofar as it applies to punitive damages. In that case the defendant below, appellant and respondent to a plaintiff's suit which sought to charge damages caused by the trespass of grazing sheep to the irrigation

ditch belonging to the plaintiff below, the defendant in the lower court was in possession and control of a band of sheep which, for about two weeks, was grazing on the land over which plaintiff's irrigation ditch was maintained. The land was owned by a Mr. Bain and at said time was used for grazing purposes by the defendant under an agreement with Bain.

Plaintiff's testimony tended to show that the supply of water in said irrigation ditch was materially lessened at the time said sheep were being grazed on said land by the defendant and as a result various crops depending on said water supply were seriously damaged. There was also testimony disclosing the nature and the extent of the damage to the ditch itself. There was no testimony in the record by anyone claiming to have seen said sheep driven upon or into said irrigation ditch. There was no testimony to the effect that the defendant had personal supervision over the sheep. The testimony showed that the camp tenders and herders employed by the defendant were in charge of the sheep at all times. The appellate court sustained the award for compensatory damages but upon the question of punitive damages the court had this to say:

> ". . . there is nothing in the record challenging or questioning the fact that defendant had camp tenders and herders in charge of the sheep in question. While it is in evidence that for a day or two defendant, himself was at the premises in suit during the time that the sheep were there, there is nothing in the record tending to disclose that the damage to the ditch was done while the

> defendant was present. There is nothing indicating that any unpleasantness or trouble had occurred between the plaintiff and defendant. As far as this record discloses, their only contact with each other occurred when one of the plaintiffs, Mr. Fuller, met the defendant and told him that the sheep were grazing on plaintiff's land, whereupon defendant at once agreed to pay for such grazing. Nothing was said to defendant about any damage to the ditch. Defendant testified that he knew nothing about the plaintiff's claim for damages to the ditch until an attorney for plaintiff, at Walla Walla, presented a demand for payment. This is not denied or controverted."

The court further said:

> "In this jurisdiction a principal cannot be held in punitive damages for act of his agent committed without his knowledge and without ratification by the principal."

The court there cited *Gill v. Selling,* 125 Ore. 587, 267 Pac. 812, 58 ALR 1556.

In that case the court dealt particularly with punitive damages and asked itself whether or not the trial court erred in submitting to the jury the question of punitive damages. The court said and we quote:

> "Whether the evidence was sufficient to go to the jury on this issue was a question of law for the court to determine. *Rennewanz v. Dean,* 114 Or. 259, 229 Pac. 372."

The court further said that in some jurisdictions the principal may be held in punitive damages for the acts of his agent, even though done without his knowl-

edge or subsequent ratification, but not so in this jurisdiction.

Appellants submit that the case law of Oregon on this particular point is representative of the weight of authority and the dictates of common sense and good judgment.

Manifestly the verdict as applied to these appellants was excessive if not clearly erroneous.

E. THE TRIAL COURT ERRED IN FIXING INTEREST ON THE JUDGMENTS.

The appellants have excepted to the judgment of the court in that the judgment entered in each of the consolidated cases was dated January 17, 1956, and by specific order therein contained, interest on said judgments was assessed at the rate of 6% per annum from and after ten days following the date of the jury's verdict, or October 18, 1955. The appellants except to the entry of interest from and after said date on the basis of Federal Rules of Civil Procedure Rule 58. It is conceded that in the absence of a pending motion to set aside a verdict, judgment should have been entered forthwith upon the return of the verdict. It might further be conceded for the sake of argument that if appellants' motion had been frivolous or sham or even in the case of being denied that the court might conceivably enter interest from and as of the date of the verdict, but where, as in this case, the court not only had the motion for a judgment notwithstanding verdict and in the alterna-

tive a new trial before it, but the court did in fact order a remittitur in the L. A. Martin case, such action on the part of the court appears arbitrary and athwart the law in such case made and provided.

Attention of the court is called to the case of *Murphy v. Lehigh Valley R. Co.,* 158 Fed. (2d) 481. The court said as follows:

> "On the plaintiff's appeal the judgment should be modified in respect to the allowance of interest, Had there been no pending motion to set aside the verdict judgment could, and should, have been entered forthwith with the clerk in accordance with the rule 58, Federal Rules of Civil Procedure, 28 USCA following section 723 c. But after the motion was made it had to be decided before any judgment could be entered. The motion was granted conditionally with leave to the plaintiff to file a remittitur. This was done and the court made the judgment order on October 11, 1945. That was when the notation of the judgment in the civil docket should have been made and it became the judgment day. Rule 79 (a). Since there was no date previous to October 11, 1945 on which the judgment could have, and should have, been entered it became the date from which interest was allowable."

The court further cited there *Louisiana & Arkansas R. Co. v. Pratt,* Fifth Circuit, 142 Fed. (2d) 847.

The case cited is on all fours with the situation confronting us in the case at bar. It is true that the verdict of the jury was rendered and dated October 8, 1955. However, between October 8, 1955 and January 17, 1956 there were pending before the court

several motions. It will be seen at R 1-07, p. 51 that the minute order denying motion for a new trial, granting motion for remittitur and denying motion for allowance of attorney's fees and court costs for defendants Wise and McDonald, was entered in the journal on December 30, 1955. There was some slight delay between December 30, 1955 and the date of actual entry of judgment because this very question was then before the court for hearing and until the hearing was concluded and the court made its decision it is the contention of the appellants that there could be no conclusive obligation on the part of the appellants and the retroactive assessment of interest was clearly erroneous.

Apparently the court in setting the interest to commence 10 days following the verdict of the jury concluded that no execution could be taken on the judgment under the Federal Rules of Civil Procedure until ten days after the entry of judgment and further reasoned that the judgment should have been entered forthwith following the jury's verdict on the 8th of October, 1955. Whatever the reasoning of the court it is clear that the rule laid down in *Murphy v. Lehigh Valley R. Co.* is well reasoned and controlling. The trial court accordingly erred.

IV. CONCLUSION.

Appellants are aware that the reviewing courts as a matter of general practice go no further in the consideration of a case than is necessary to establish

the end result. Appellants contend that the failure of the appellee to establish evidence of the relationship of master and servant between the actors and the appellants at the time of the alleged wrongful acts, entitles the appellants to a direction and should accordingly call for reversal as to the appellants by this court.

The appellants admit there is lack of clarity in the drawing of the lines of battle because appellee's case was pled, instructions requested and proof attempted under the theory of riot and unlawful assembly. There is, as appellants contend, a complete failure of proof on this point and the verdict of the jury being self-contradictory, should on either of the premises above stated be set aside.

Should the court agree with either of the conclusions of the appellants above stated, the balance of the argument would become moot. The appellants contend that such a conclusion in no way detracts from the merits of the argument instruction 14 should not have been given under the facts and pleadings, nor that the damages are clearly excessive in all amounts over $2500.00 in each case. Insofar as appellants urging a $2500.00 maximum is concerned, it is admitted that $2500.00 in each case is an arbitrary determination but no formula of reason known to appellants would justify a verdict in more than five times the amounts of the actual or pecuniary loss, under the facts here presented.

With appellants' argument in regard to interest there should be no quarrel. The law is clear and un-

equivocal that until there is a judgment there is no obligation upon which to premise a payment of interest.

The judgment of the lower court should be reversed.

Dated, Anchorage, Alaska,
November 9, 1956.

DAVIS, RENFREW & HUGHES,
By JOHN C. HUGHES,
Attorneys for Appellants.